

Relations Among the Ranks: Observations of and Comparisons Among the Service Policies and Fraternization Case Law, 1999

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Introduction

The information gathered by the Task Force . . . revealed . . . that the Services defined, regulated and responded to relationships between service members differently. Such differences in treatment are antithetical to good order and discipline, and are corrosive to morale, *particularly so as we move towards an increasingly joint environment.*¹

It is the spring of 2000 and, on a fine Balkan morning at Camp Cohen, you, as the task force legal advisor, are hailed into the commander's office to discuss certain "situations." Task Force Deep Purple is truly joint: it is comprised of members of all the services and is commanded by a senior Army officer. The commander greets you with a gruff "Dobro dan"² and explains the problems he now faces.

The first involves two second lieutenants (one Army and one Air Force) who have apparently developed potentially problematic personal relationships with an Air Force master sergeant (E-7). The Army officer has also begun to date a senior noncommissioned (NCO) from one of the troop contributing nations. The last problem involves a Navy chief petty officer (E-7) who has also developed a potentially problematic personal relationship with an Air Force sergeant (E-5). With the exception of the foreign soldier, all involved parties are assigned to the headquarters element of this joint task force and all perform duties within the camp.

Separate informal investigations have established the following facts concerning each of the relationships. The Army officer has on occasion, but no more than three times, loaned small amounts of money to the Air Force NCO to help him assist his family with an emergency at home. Each time, the loan is non-interest bearing and the understanding is the enlisted man will pay it back as soon as he is able. No one knew about this debtor-creditor relationship until the officer commented to her supervisor that she was "helping out a friend." Her supervisor informed her that she was out of compliance with Army policy and that she needed to refrain from future

acts of borrowing and lending with enlisted personnel. On hearing this, the Air Force lieutenant, believing himself not to be subject to such a strict rule, declared "well then I'll be the one to lend the money to the master sergeant until he gets through these hard times."

The Army lieutenant has also begun a romantic relationship with a foreign enlisted soldier deployed as a member of the multinational brigade that is part of the task force. Their relationship began pursuant to the officer's duties as a liaison officer and interpreter. On occasion, the pair has been seen together at various locations in the camp and they are often seen together at official functions. In every instance, they are discreet and observe military customs, but they also appear to be on very friendly terms.

The chief petty officer has also found love in this desperate land and is dating the Air Force sergeant. Much like the officer-enlisted couple above, this pair is discreet and has kept the relationship fairly under cover. No one knows of any sexual liaisons and it appears that the two NCOs limit the relationship to spending as much time together as they can outside of their sleeping areas. The two are assigned to the same company but work in separate sections, thus they have no direct senior-subordinate supervisory relationship. When on-duty and in public places they display all the requisite courtesies and respect inherent to superior-subordinate relations. However, it is common knowledge that the couple is "an item."

The task force commander is feverishly preparing to chair a major trilateral meeting to be attended by the various ethnic faction leaders and has limited time to discuss resolving the situations. He asks you for advice and wonders if he's dealing simultaneously with unprofessional, unduly familiar, prohibited relationships, and fraternization. Should he, must he, can he punish the respective parties and why? How can he prevent such relationships from occurring again? Oh and by the way, he has heard that the Army lieutenant and the foreign NCO are to be married next week while on mid-tour leave—does that have any bearing on this issue?

1. Memorandum, Secretary of Defense, to Service Secretaries, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, subject: Good Order and Discipline (29 July 98) [hereinafter SECDEF Memo] (emphasis added).

2. Serbo-Croatian for "Good Day."

Background

On 2 March 1999, the Army changed its policy with regard to relationships among the ranks.³ This change, effected by a Department of the Army message,⁴ has since been incorporated into the revised Army regulation governing command policy.⁵ The revised policy reflects a response to a mandate issued by Secretary of Defense (SECDEF) William Cohen on 29 July 1998.⁶ That mandate, prompted by findings of a task force that had spent the previous year examining, inter alia, breaches of good order and discipline and the responses thereto by the different services, required the services to establish policies that prohibit certain relationships among the ranks and, specifically, between officer and enlisted members.⁷

One of the compelling reasons behind the SECDEF's mandate is the perceived need "to eliminate as many differences in disciplinary standards as possible and to adopt uniform, clear and readily understandable policies."⁸ It is apparent that the SECDEF perceives that adopting and enforcing uniform poli-

cies is critically necessary to successful contemporary military operations, and the men and women who serve today are owed nothing less than an even playing field concerning permissible relations among the ranks.⁹

During a press conference, conducted on 29 July 1998, Under Secretary of Defense for Personnel and Readiness, the Honorable Rudy de Leon,¹⁰ fielded several questions regarding the former Army policy and reiterated the SECDEF's jointness concerns.¹¹ During this press briefing, the perception emerged that the Army's policy would require the most revision and that changes with regard to relationships among the ranks would involve a requisite "transition question."¹² Perhaps in response to the issue of a transition period the Army policy tempered its policy with a one-year grace period for certain previously authorized relationships.¹³

From the inception of the Army's new policy, observers have mused on its comparison and contrast to its former self and to other service policies. During the grace period com-

3. See generally Major Michael J. Hargis, *The Password is "Common Sense": The Army's New Policy on Senior-Subordinate Relationships*, ARMY LAW., Mar. 3, 1999, at 12 (providing an excellent background discussion and analysis of the changed policy). In addition, that the changed policy has been in effect now for nearly one year should not surprise anyone in DA as a vigorous training regimen has also been in effect during this same period of time.

4. Message, 020804Z Mar 99, Headquarters, Dep't of Army, DAPE-HR-L, subject: Revised Policy on Relationships Between Soldiers of Different Ranks (2 Mar. 1999).

5. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, paras. 4-14 through 4-16 (15 July 1999) [hereinafter AR 600-20].

6. SECDEF Memo, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.* "In order to support our national objective, the military Services task organize, deploy and fight predominantly as a unified force. In today's military environment, we owe it to our forces to eliminate as many differences in disciplinary standards as possible and to adopt uniform, clear and readily understandable policies." The services were given thirty days to draft implementing plans and to provide the SECDEF their respective training materials within sixty days.

10. Mr. de Leon chaired the task force convened by the SECDEF to examine the issue of resolution of breaches of good order and discipline.

11. The following exchange occurred:

Question: Did you find any problems with the way the Army policy has operated? Did you find a greater instance of punishment being meted out or lesser punishment or more cases that had to be brought for adjudication on the issue of fraternization? I mean, was there anything wrong with the way the Army policy, aside from the way it didn't mesh with the other Services, was operating?

Under Secretary de Leon: I think the key issue is really the joint environment. There were pluses and minuses of the policy as it existed. But I think in the end, we really are a joint operation around the world. And it was essentially the fact that Services, members of different Services are out there side by side and you really can't have [sic] different set, [sic] of rules governing their conduct.

Remarks to the Press regarding the Secretary of Defense's Policy on Good Order and Discipline (29 July 1998) available at <www.defenselink.mil> [hereinafter DOD News Briefing] (providing a transcript of the entire news briefing).

12. *Id.* at transcript 6. In response to a question concerning the impact that changed policies would have on the National Guard and Reserve personnel, DOD General Counsel Judith Miller responded "the other Services have had this policy apply in the Guard and Reserve. And at least according to the testimony that we heard in the task force on good order and discipline, that worked pretty well for them. So I think it's mostly a transition question." *Id.*

13. See, e.g., AR 600-20, *supra* note 5, para. 4-14c(1). "Business relationships which exist at the time this policy becomes effective, and that were authorized under previously existing rules and regulations, are exempt until March 1, 2000." Certainly, it can also be said that the grace period eases the transition from the former effects-based policy to the new status-based, bright-line policy. "Grace period" is defined as "a period of time after a payment becomes due, as of a loan or life insurance premium, before one is subject to penalties or late charges or before the loan or policy is canceled." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998).

manders, soldiers, judge advocates, and many others have analyzed the new changes to ascertain whether the over-arching goal of consistency has been achieved. This article reveals that, while all the current service policies afford the respective commanders the ability to arrive at a conclusion that is ultimately consistent with other policies, there remain minor, yet important, differences that dilute the final conclusion of consistency. The article generally compares the various service policies, discusses the hypothetical situation faced by a deployed task force commander, offers suggested approaches to resolving situations that cross service lines, and concludes with a discussion of select cases involving fraternization reported the previous year.

Different Strokes for Different Folks? The Services' Policies Compared

The Current ("New") Army Policy¹⁴

The new policy (as distinguished from the former one) is punitive and begins with a list of prohibited relationships among the ranks.¹⁵ In accordance with paragraph 4-14b of *Army Regulation (AR) 600-20*, relationships among the ranks (specific rank is immaterial) are prohibited if they exhibit any of five adverse effects.¹⁶ The regulation then lists those relationships between officer and enlisted personnel that are prohibited.¹⁷ These status-based prohibitions are "bright-line" but also include several exceptions. Prohibited business relationships are off-limits if they can be described as "on-going,"

yet several exceptions allow for limited relationships and for one-time transactions.¹⁸ The borrowing or lending of money is prohibited and the regulation lists no exigent circumstances or excuses for a debtor-creditor relationship, of any degree, to exist between officers and enlisted.¹⁹ Commercial solicitation and any other financial relationship are similarly disallowed.²⁰

In the realm of personal relationships, "dating, shared living accommodations other than those directed by operational requirements, and intimate or sexual relationships between officers and enlisted personnel" are prohibited.²¹ Again, several exceptions exist that serve to keep a relationship within policy compliance.²² Officers and enlisted members are further prohibited from gambling with each other, without exception under the new policy.²³

The "grace period" previously mentioned provides a twelve-month transition period for officers and enlisted to bring their relationships (business or personal) into compliance with the policy.²⁴ While this grace period is not found within any of the other services' policies it is apparent that the Army policy, inasmuch as it establishes a new bright-line approach to officer-enlisted relationships, needed such a probationary time period to ease the burdens on those personnel involved in prohibited relationships.²⁵ During this period of adjustment some discussion has focused on whether one year's time is sufficient to allow for problem-free transition. Empirical data, while limited, suggests that the grace period is long enough.²⁶

14. Notwithstanding previous published discussion and analysis of the new Army policy (*see generally* Hargis, *supra* note 3), as well as training sessions and other instruction that Department of the Army (DA) personnel are to have received by now, it is important to describe the current Army policy herein. Informal input solicited from the field as well as from students attending The Judge Advocate General's School, U.S. Army (TJAGSA) Continuing Legal Education and other courses, consistently reveals that not all DA personnel have received official training (formal or informal) on the policy. When polled, students attending recent senior officers legal orientation courses report that nearly 60% have not previously received instruction on the policy. Students in other courses also report an approximate 30% that have not received the instruction. By attending TJAGSA short courses, these personnel in fact receive the required instruction, but the input from attendees suggests that perhaps the troops in the field are not getting the message. Especially now that the one-year transition period has expired, it is critical that commanders obtain an idea as to how many of their troops and other personnel have been instructed on the policy. One suggestion is to include in Fiscal Year 2000 third quarter training calendars a block of instruction on the policy with special emphasis on the end of the transition period. Consistent with past "chain teaching" methodologies, commanders (down to the company level) must instruct their subordinate officers and senior noncommissioned officers (down to the first sergeant level) must so instruct their unit personnel. Judge advocates understandably play a critical role in this instruction.

15. AR 600-20, *supra* note 5, para. 4-16. "[V]iolations of paragraphs 4-14b, 4-14c, and 4-15 may be punished under Article 92, UCMJ, as a violation of a lawful general regulation."

16. The five adverse effects under the regulation are if the relationships (1) compromise, or appear to compromise, the integrity of supervisory authority or the chain of command; (2) cause actual or perceived partiality or unfairness; (3) involve, or appear to involve, the improper use of rank or position for personal gain; (4) are, or are perceived to be, exploitative or coercive in nature; (5) create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission. AR 600-20, *supra* note 5, para. 4-16b. These effects-based prohibitions include two additional prohibited relationships that were not listed under the former policy—relationships covered by numbers (1) and (4).

17. AR 600-20, *supra* note 5, para. 4-14c(1).

18. These include landlord-tenant relationships and the one-time sale of an automobile or a house.

19. AR 600-20, *supra* note 5, para. 4-14c(1).

20. *Id.* Army National Guard and Reserve personnel are not subject to the provisions of this prohibition provided their business or financial relationship exists "due to their civilian occupation or employment." *Id.*

21. *Id.* para. 4-14c(2).

Two additional types of relationships are strictly prohibited by the new Army policy. Now, “any relationship between permanent party personnel and initial entry trainees not required by the training mission” is off-limits.²⁷ Additionally, any relationship “not required by the recruiting mission” is prohibited as between members of the U.S. Army Recruiting Command and “potential prospects, applicants, members of the delayed entry program (DEP), or members of the delayed training program (DTP).”²⁸ The recruiter-recruit and trainer-trainee prohibited relationships, the officer-enlisted relationships covered by AR 600-20, paragraph 4-14c, and the prohibited relationships regardless of rank found in AR 600-20, paragraph 4-14b show that the new Army policy has merged a previous effects-based approach with the SECDEF’s status-based mandate to create a hybrid designed to be more consistent with the other service policies.

Prior to the SECDEF mandate, the Air Force policy already included a status-based approach with respect to officer-enlisted relationships and prohibited many of those relationships now seen in the new Army policy.³⁰ The new Air Force policy continues to prohibit many officer-enlisted relationships and continues to analyze all ranks relationships under the rubric of “unprofessional relationships.”³¹ The policy, as distinguished from its Army counterpart, is punitive in application only to officers.³² Enlisted personnel who violate the policy are punished through a variety of other means and, without having received some other order or additional duty from a superior, cannot be punished solely under the policy.³³

Air Reserve Component personnel (ARC), like their Army counterparts with respect to the Army policy, are subject to the provisions of the Air Force policy. Paragraph 3.8 advises Air

22. *Id.* paras. 4-14c(2)(A)-(C). These include marriages that predate 2 March 1999 or are entered into prior to 1 March 2000; personal relationships outside of marriage that predate 2 March 1999, but are brought into compliance before 1 March 2000; and those relationships that move into noncompliance by virtue of a change in status of one of the parties (e.g., through commissioning, the *marital* relationship formerly between two enlisted soldiers now involves an officer and an enlisted). Note that this latter exception would not insulate a couple that is merely dating. After the change in status of one of the parties, that couple would have to take some affirmative step to bring the relationship into compliance. They could not continue a dating relationship and would also have to observe the other rules concerning prohibited officer-enlisted relationships. On the issue of officer-enlisted marriage, the policy is silent with regard to marriages that occur after 1 March 2000. A commander who learns of such a marriage must ascertain if the requisite predicate relationship before the marriage violated the policy. Additional exceptions are listed to cover situations involving relationships within the Guard and Reserves and relationships between active duty soldiers and members of the Guard and Reserves. If the relationship “primarily exists due to civilian acquaintanceships” (relationships within the Guard or Reserves) or “primarily exists due to civilian association and the reserve component member is not on active duty” (relationships between active and reserve component members), then it is not out of compliance with the policy. AR 600-20, *supra* note 5, para. 4-14c(2)(d), (e). Note that in both situations, the exception does not apply if the reserve component member is on active duty (defined by the regulation as “other than annual training” *id.* para. 4-14c(2)(d) and (e)).

23. *Id.* para. 4-14c(3).

24. *See, e.g., id.* paras. 4-14c(1), (2)(B).

25. *See* DOD News Briefing, *supra* note 11. The following question was posed to Undersecretary de Leon:

Question: “If I’m a young person in the military and I’m dating another person in the military, do I need to find a chaplain and rush to the altar? I mean, how are the troops supposed to take this?”

Secretary de Leon: “I think we’ll go through a transition period with respect to the Army but our goal was to make the policy clear and fair.”

Id. at transcript 8.

26. The grace period has witnessed very little activity with regard to requests for exceptions to the end date of 1 March 2000. To date, there have been four requests for exceptions to policy, each of which involves active duty soldiers seeking exceptions because of scheduled wedding dates that will occur beyond the grace period’s termination. Electronic Interview with Chaplain (MAJ) B. Duncan Baugh, Command Policy Officer (Feb. 10, 2000). Chaplain Baugh is also the current point of contact for the proponent of the policy (Office of the Deputy Chief of Staff, Personnel (ODCSPER)). Exceptions to policy should be analyzed by judge advocates but ultimately can be forwarded through personnel channels to Chaplain Baugh.

27. AR 600-20, *supra* note 5, para. 4-15a. The prohibition extends beyond the actual situs of the relationship between the trainer and the trainee: “[T]his prohibition applies to permanent party personnel without regard to the installation of assignment of the permanent party member or the trainee.” *Id.*

28. *Id.* para. 4-15b.

29. U.S. DEP’T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2909 (1 May 1999). [hereinafter AFI, 1 May 1999].

30. *See generally* U.S. DEP’T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2909, para. 5 (1 May 1996).

31. Unprofessional relationships are “those interpersonal relationships that erode good order, discipline, respect for authority, unit cohesion and, ultimately, mission accomplishment.” *See* AFI, 1 May 1999, *supra* note 29, preamble.

32. *Id.* Even then, only the prohibitions listed in paragraph 5.1 subject the officer to possible punitive sanctions. The remaining provisions of the policy are not punitive with regard either to officers or enlisted personnel.

Force commanders and supervisors to “tailor the application and enforcement of the principles [of the policy] to appropriately address unique situations that may arise from part time service.”³⁴ However, unlike the Army’s policy, the reach of the Air Force policy goes a bit further. Whereas Army Guard and Reserve personnel are only subject to the policy while on active duty or full-time National Guard duty, ARC personnel are subject to the AF policy during periods of active duty, full-time National Guard duty, *and* during inactive duty training.³⁵ Army personnel feel the reach of the policy, at least with respect to personal relationships outside of marriage, only during periods of active duty or full-time National Guard duty.³⁶ Periods of duty described as “annual training” are not covered by the Army policy. Thus, in the case of personal relationships, the Army reserve or guard soldier performing weekend or annual training is exempt from coverage but his Air Force reserve component peer, also on inactive duty training, is not.³⁷

The Air Force policy delineates the same prohibitions regarding officer-enlisted relationships as does the Army policy but provides further explanation regarding marriages and, at least in one instance, an exception not found in the Army counterpart. “With reasonable accommodation for married members and members related by blood or marriage,”³⁸ officers

may not gamble with enlisted members, engage in sexual relations or date enlisted members, share living accommodations with enlisted members (except when reasonably required by military operations), or engage in (on a personal basis) business enterprises with or solicit or make solicited sales to enlisted members (“except as permitted by the Joint Ethics Regulation”).³⁹ With regard to borrowing or lending money, officers may not enter into such a relationship with enlisted members and may not “otherwise become indebted to enlisted members.”⁴⁰ An exception, however, is available that distinguishes this policy from the Army’s stricter prohibition. Air Force officers may borrow from or lend money to enlisted members “to meet exigent circumstances.”⁴¹ Provided the amount is small and that the debtor-creditor relationship is infrequent and that the loan is of a non interest-bearing nature then this activity is permitted.⁴²

Like its Army counterpart, the Air Force policy holds all military members accountable for their conduct but notes that the senior member “bears primary responsibility for maintaining the professionalism of [a] relationship.”⁴³ On the issue of what effect marriage has on policy compliance, the Air Force policy, unlike the Army’s, specifically notes that subsequent marriage “does not preclude appropriate command action based

33. See *id.* para. 4. “Relationship of Unprofessional Conduct to Other Provisions of the UCMJ,” observes that military members who have been ordered to cease an unprofessional relationship or to refrain from certain conduct may be punished for violating the order. Thus, Articles 90 and 91 are potential sources of resolution for enlisted participation in unprofessional relationships. UCMJ arts. 90, 91 (LEXIS 2000). Additionally, paragraph 3.5.4 affords commands providing recruiting, training and education functions with the ability to “consistent with this instruction, publish supplemental directives, to include punitive provisions.” AFI, 1 May 1999, *supra* note 29, para. 3.5.4. Thus, enlisted Air Force personnel, out of compliance with the Air Force prohibitions against personal relationships between recruiter-recruit, trainer-trainee, or faculty-student, cannot be punished under the policy itself. While only officers may be punished for a violation of Article 92, UCMJ (note: officers and enlisted may both be punished under the Army policy), enlisted personnel could be issued “no-contact orders” and could also be punished under a variety of other UCMJ provisions, to include fraternization or conduct prejudicial to good order and discipline, Article 134. Of course, a host of administrative sanctions are also available for resolution.

34. See AFI, 1 May 1999, *supra* note 29, para. 3.8.

35. *Id.*

36. AR 600-20, *supra* note 5, para. 4-14c(2)(d).

37. *Id.* The prohibitions concerning officer-enlisted relationships does not apply to “[p]ersonal relationships outside of marriage between members of the National Guard or Army Reserve, when the relationship primarily exists due to civilian acquaintanceships, unless the individuals are on active duty (*other than annual training*) or full-time National Guard duty (*other than annual training*).” AR 600-20, *supra* note 5, para. 4-14c(2)(d). (emphasis added). An additional twist, not covered in the Air Force policy, concerns personal relationships outside of marriage between active component personnel and reserve component personnel. An Army officer could have such a relationship with a Guard or Reserve enlisted soldier provided that relationship “primarily exists due to civilian association and the Reserve component member is not on active duty (other than annual training) or full-time National Guard duty (other than annual training).” *Id.* para. 4-14c(2)(e). Essentially, the relationship could exist at all times except when the enlisted soldier was ordered onto active duty. The Army officer could also have such a relationship with an Air Force reserve component airman but that relationship could not exist during the airman’s weekend drill, annual training, full-time National Guard duty, and active duty. Recall that the Army policy, like the Air Force policy, applies across service lines. *Id.* para. 4-14a; AFI, 1 May 1999, *supra* note 29, para. 3.1.

38. See AFI, 1 May 1999, *supra* note 29, para. 5.1. No such language is found within the new Army policy. Presumably, married Army personnel and Army personnel linked through blood or marital ties are equally subject to the specific prohibitions regarding officer-enlisted relationships and must therefore exercise caution, prudence, and discretion while on-duty and performing military duties together. The Air Force policy expands on this theme even further: “[r]egardless of how the officer-enlisted marriage came to be, married members are expected to respect all customs and courtesies observed by members of different grades when they are on duty, in uniform in public, or at official social functions.” *Id.* para. 5.1.3.1.

39. See *id.* paras. 5.1.1, 5.1.3 – 5.1.5.

40. *Id.* para. 5.1.2.

41. *Id.* No additional clarification or explanation is provided to define “exigent circumstances.”

42. *Id.*

on the prior fraternization.”⁴⁴ Finally, the policy outlines those actions that may be taken to resolve instances of noncompliance and notes that the commander’s response “should normally be the least severe necessary to terminate the unprofessional aspects of the relationship.”⁴⁵

The United States Navy and United States Marine Corps Policies

Both the Navy and the Marine Corps policies include the overarching prohibition against personal relationships between officers and enlisted members that are “unduly familiar and that do not respect differences in rank and grade.”⁴⁶ This approach is not new but was part of the former policies employed by these services.⁴⁷ The current policies, like the Army one, are punitive and apply equally to officers and enlisted members.⁴⁸ Likewise, the reach of the policies extends across service lines,⁴⁹ is gender-neutral,⁵⁰ and includes analysis of prohibited adverse effects of all ranks relationships.⁵¹ The policies also include specific prohibitions against unduly familiar relationships between certain noncommissioned officers and junior personnel assigned to the same command.⁵²

The specifically prohibited officer-enlisted relationships basically mirror those of the Army policy and are per se unduly familiar.⁵³ However, no exceptions (such as those found in the Army policy) are included and prohibited business relationships are termed “private business partnerships.”⁵⁴ Subsequent marriage does not insulate the officer-enlisted couple from sanctions for an impermissible predicate relationship,⁵⁵ and service members (regardless of rank) who are married to other service members (or have some family tie) must “maintain the requisite respect and decorum attending the official relationship while either is on duty or in uniform in public.”⁵⁶ Finally, unduly familiar personal relationships in the trainer-trainee and recruiter-recruit arena are prohibited.⁵⁷

*The United States Coast Guard Policy*⁵⁸

Coast Guard personnel may participate in “acceptable” relationships that do not jeopardize the members’ impartiality, undermine inherent respect for authority, result in improper use of the relationship for gain or favor, or violate the UCMJ.⁵⁹ Officers and enlisted may not have “romantic relationships outside of marriage”⁶⁰ but may be married, provided the marriage occurred before the officer received the commission.⁶¹ Other

43. *Id.* para. 6.

44. *Id.* para. 5.1.3.1.

45. *Id.* para. 8.

46. CHIEF OF NAVAL OPERATIONS INSTR. 5370.2B, para. 3. (27 May 1999) [hereinafter OPNAVINST 5370.2B]; *see also* MARINE CORPS MANUAL, para. 1100.4 (C3, 13 May 1996) [hereinafter MARCORMAN].

47. *See* CHIEF OF NAVAL OPERATIONS INSTR. 5370.2A (14 Mar. 1994).

48. OPNAVINST 5370.2B, *supra* note 46, para. 3.

49. *Id.* para. 6b.

50. *Id.* para. 4c.

51. *Id.* paras. 5c, 6c.

52. *Id.* para. 5b (“[P]ersonal relationships between chief petty officers (E-7 to E-9) and junior personnel (E-1 to E-6), who are assigned to the same command, that are unduly familiar and that do not respect differences in grade or rank are prohibited.”); MARCORMAN, *supra* note 46, para. 1100.5 (“[T]he provisions of paragraphs 1100.3 and 1100.4 above apply to the relationship of noncommissioned officers with their subordinates and apply specifically to noncommissioned officers who may be exercising supervisory authority or leadership roles over junior marines.”).

53. OPNAVINST 5370.2B, *supra* note 46, para. 6b.

54. *Id.*

55. *Id.* para. 6e.

56. *Id.* para. 6f.

57. *Id.* para. 5b. The prohibition extends only to those unduly relationships “that do not respect differences in grade, rank, or the staff/student relationship.” *Id.*

58. As an element of the Department of Transportation, the Coast Guard was not impacted by the SECDEF’s mandate.

59. U.S. COAST GUARD PERSONNEL MANUAL, ch 8.H.2.c (C26, 3 Feb. 1997).

60. *Id.* ch 8.H.4.c.

unacceptable romantic relationships include those between members in a superior-subordinate relationship, members assigned to the same shore unit comprised of less than sixty members, members assigned to the same cutter, those where the relationship is between a chief petty officer (in the grades of E-7 to E-9) and junior enlisted personnel (E-4 and below), or those that “disrupt the effective conduct of daily business.”⁶² Regardless of rank or position, Coast Guard personnel may not engage in “sexually intimate behavior” on board any Coast Guard vessel or in any Coast Guard controlled work place, and instructors at training commands may not engage in personal or romantic relationships with students.⁶³ These two types of relationships, as well as romantic relationships outside of marriage between officers and enlisted, are punished as violations of a lawful general regulation.⁶⁴ However, unacceptable relationships, as described above, are normally resolved in an administrative fashion.⁶⁵

On the Cusp of Jointness: Cross-Service Relationships in a Deployed Setting

Analysis

Back in the legal office of Task Force Deep Purple you have researched and compared the respective policies. Under the Army policy regarding relationships amongst the ranks, the Army and Air Force lieutenants improperly loaned money to the Air Force master sergeant, regardless of the laudable reasons for the loan.⁶⁶ If the Army policy applied to the joint task force, and the commander had UCMJ authority over all task force members, then the commander could take punitive action against both officers and the master sergeant.⁶⁷ However, under the mitigated facts, the commander could consider the reasons

for the loans, and take lesser administrative action (for example, counseling, reprimand) that would comport with the needs of good order and discipline.⁶⁸

If the Air Force policy applied, the above results would be different. First, the Air Force policy recognizes an exception for borrower-lender relationships amongst officers and enlisted when the basis for the loan is exigency.⁶⁹ On our facts, the emergency nature of the loans (also considering that the loans are small, infrequent, and non-interest bearing) likely constitutes exigency. Therefore, there would not be a violation of the Air Force policy. Furthermore, if exigency was not found, then only the officers could be given UCMJ punishment; unlike the Army policy where punitive action may be taken against all soldiers, regardless of rank, the Air Force policy is only punitive with respect to the officer member of a prohibited relationship. Finally, the Air Force policy also requires that the commander’s response be the least severe necessary to stop the unprofessional relationship;⁷⁰ based on the facts in the scenario, this would likely preclude UCMJ action and result in resolution by administrative action.⁷¹

The dilemma for the Task Force commander is whether, by virtue of their assignment to the task force, the Air Force personnel are subject to the stricter provisions of the Army policy. If they are not, then they escape punishment because their conduct passes muster under Air Force rules. Meanwhile, the Army officer, whose conduct is not in compliance with the Army rules, is subject to a variety of sanctions. This scenario highlights a discrepancy between the two policies that creates the differences in treatment that the SECDEF finds to be “antithetical to good order and discipline” in a joint environment.⁷²

The lieutenant’s dating relationship with the foreign enlisted soldier also presents a challenging issue. The SECDEF’s man-

61. *Id.* ch. 8.H.4.d. Note also that “misconduct, including fraternization, is neither excused nor mitigated by subsequent marriage.” *Id.*

62. *Id.* ch. 8.H.2.f.

63. *Id.* ch. 8.H.2.g.

64. *Id.*

65. *Id.* ch. 8.H.2.d.3.d. Other unacceptable relationships and conduct include: supervisors and subordinates in private business together; supervisors and subordinates in a romantic relationship; supervisors and subordinates gambling together; supervisors and subordinates giving or receiving gifts on an other than infrequent basis; changing duty rosters or work schedules to benefit parties to the relationship when others in the command do not receive the same benefit. *Id.* ch 8.H.3.b. and c.

66. AR 600-20, *supra* note 5, para. 4-14c(1).

67. *Id.* para. 4-16.

68. *Id.* para. 4-14f.

69. AFI, 1 May 1999, *supra* note 29, para. 5.1.2.

70. *Id.* para. 5.1

71. *Id.* para. 8.

72. SECDEF Memo, *supra* note 1.

date, meant to address relationships among DOD personnel, prohibits officer-enlisted dating “regardless of their Service.”⁷³ The Army policy conforms to this provision and applies to relationships “between Army personnel and personnel of other military services.”⁷⁴ The problem lies in an expansive interpretation of these words, which would support the conclusion that the lieutenant is not in compliance with the policy and could be ordered to end the relationship with her foreign friend.⁷⁵ But as to punishment, in spite of the conclusion that this relationship is in the strictly prohibited category of the new policy and a violation of Article 92 of the UCMJ, the apparent absence of adverse effects would seem to mitigate against anything more than a mild administrative sanction. Recall that the couple is discreet and both soldiers appear to observe all the courtesies and respect required among officers and enlisted. Therefore, the scenario seems to present, if anything at all, a “victimless” violation of the code.

Additional support for this international application of the reach of the policies comes from the central focus of each service’s policy: the strict prohibition of certain relationships between officer and enlisted personnel. Although none of the policies address the international aspect presented by this hypothetical situation, each includes as a foundation that romantic relationships outside of marriage between officers and enlisted service members is prohibited. The core issue lies in the status of the parties as military members and not in their respective citizenship.⁷⁶ The Army lieutenant is involved in an intimate relationship with an enlisted soldier. Such a relationship is prohibited by Army policy.

That the couple intends to marry next week whilst away on mid-tour leave should be irrelevant to the analysis of the relationship’s compliance with policy and should, instead, be relevant only as to punishment. Recall that the Army policy is silent as to the effect of officer-enlisted marriages that occur after 1 March 2000.⁷⁷ The other service policies note that marriage does not excuse or justify the predicate relationship that was itself out of compliance with policy. The only option is for the Task Force commander to conclude that the relationship is

one strictly prohibited by policy and the intent of the two lovers to marry has no bearing on that conclusion.

The chief petty officer (an E-7) and the Air Force sergeant appear not to be out of compliance with the Army policy. No adverse effects have been shown that would subject the pair to sanctions for violations of AR 600-20, paragraph 4-14b. There is no other strictly prohibited category of which they run afoul. An Army couple, similarly situated, would not be out of compliance with Army policy. However, recall that the Navy policy specifically prohibits unduly familiar relationships between chief petty officers and junior personnel “who are assigned to the same command.”⁷⁸ If the relationship is unduly familiar and does not respect differences in rank or grade then it is out of compliance.

The first question for the Task Force commander under the Navy policy is whether this couple is “assigned to the same command.” If so, and if the determination is made that the open display of the relationship involves actual, or apparent, lack of respect for differences in rank or grade, then the relationship is problematic. Both enlisted parties would be subject to administrative and punitive sanctions. However, under an Air Force policy application, neither party would be subject to anything more severe than an administrative sanction. The Task Force commander can punish the chief petty officer for a violation of Article 92 for noncompliance with the Navy policy. He cannot, however, similarly punish the Air Force sergeant because she has *not* violated the Air Force policy and, even if she had, her noncompliance would be addressed via administrative measures.

Resolution

The scenarios show members of different services deployed together in a joint task force and involved in personal relationships that yield different analyses and resolutions under the various service policies. The minor inconsistencies within the reach and application of the various policies leave a task force commander with a familiar problem: how to address activities

73. *Id.*

74. AR 600-20, *supra* note 5, para. 4-14a. The Air Force policy notes the need to avoid unprofessional relationships “between members of different services, particularly in joint service operations” (AFI, 1 May 1999, *supra* note 29, para. 3.1) and notes that the custom against fraternization “extends to all officer/enlisted relationships.” *Id.* para. 5.0. The Navy and Marine Corps policies sanction certain officer-enlisted relationships “regardless of Service.” OPNAVINST 5370.2B, *supra* note 46, para. 6b. Certainly in the context of American forces’ joint operations the presumption is that the policies are limited in application *only to American personnel*.

75. Query: could a fraternizing relationship between an American military officer and a foreign enlisted soldier support a specification under Article 134?

76. Electronic interview with Chaplain (MAJ) B. Duncan Baugh, Command Policy Officer, ODCSPER, February 22, 2000. According to Chaplain Baugh, the language “intimate or sexual relations between officers and enlisted personnel” (AR 600-20, para 4-4c(2)) is considered by the proponent of the Army policy to include all intimate relationships among officer/enlisted personnel even though the policy does not specifically identify foreign military personnel.

77. Recall also that only those relationships that were in existence prior to 2 March 1999 were afforded the protection of the one-year grace period. Such relationships had to be brought into compliance or ended as of 1 March 2000.

78. OPNAVINST 5370.2B, *supra* note 46, para. 5b.

to be prohibited during the tenure of the task force and how to apply the prohibitions consistently to all members assigned to the task force.

A tried and true approach lies within the publication of a general order. Past practices on various deployments met with success with regard to such orders. Many examples included general prohibitions against activities that, while the troops are in garrison, are addressed in disparate ways. The commander of the task force involved in the scenarios of this article might wish to consider such a general order and also consider expanding the reach of the paragraph entitled "prohibited activities." That paragraph could include either a synopsis of the strictly prohibited relationships of the Army policy, as well as the generally prohibited all ranks relationships, or it could include, by reference, the entire policy. All members assigned to the task force would be subject to the general order and their violations of that order could be addressed in a more consistent manner. Within this general order, the commander would also prohibit certain relations among American and foreign personnel.

Even if the general order route is unpalatable to the commander or its application to all Department of Defense members problematic, many offenses under the UCMJ remain as viable options to address relations among the ranks. As is illustrated by the following cases, decided the previous year, fraternization remains as one specific example.

Fraternization or Conduct Unbecoming: Charge One or the Other but not Both?

In *United States v. Sanchez*,⁷⁹ the Air Force Court of Criminal Appeals examined several issues springing from an officer's court-martial and conviction for fraternization and conduct unbecoming an officer and gentleman. The court, relying on *United States v. Harwood*,⁸⁰ set aside and dismissed two specifications from two separate charges—one alleging fraternization and the other conduct unbecoming an officer—wherein the misconduct was charged to a greater degree of specificity in other companion specifications.

Lieutenant Colonel Sanchez, a married man, developed personal, unprofessional relationships with two female senior airmen while stationed at McConnell Air Base. In the first relationship, the couple danced and drank together at the combined ranks club and at other clubs, visited each other's quarters, kissed, and had sexual intercourse.⁸¹ The relationship was well known throughout the community. The couple was seen so much at the combined ranks club that the base senior enlisted advisor was compelled to warn the accused that he was "wearing out his welcome" at that club.⁸²

In his other problematic relationship, the accused danced with his airman paramour at a unit party, kissed her passionately in the presence of others at the party, and danced with her on other occasions at the combined ranks club and at other clubs.⁸³ The relationship also involved the couple sitting together in the accused's van while parked outside the subordinate's dormitory and in the view of several witnesses.⁸⁴

The government charged the accused with two specifications each of fraternization and conduct unbecoming an officer with respect to each of the airmen. Regarding the relationship with the first airman the specifications alleged the same conduct. As to the second airman, the fraternization specification contained more allegations of specific misconduct that did the specification alleging conduct unbecoming an officer. The Air Force court found this charging scheme to be violative of the rule in *Harwood* and dismissed the fraternization specification regarding the first airman as well as the specification alleging conduct unbecoming an officer regarding the second airman.⁸⁵

When Compared to Smoking Dope, Off-duty Fraternization is Down in the Weeds

In *United States v. Hawes*,⁸⁶ the Court of Appeals for the Armed Forces (CAAF) affirmed the Air Force court's sentence reassessment that yielded no relief to the appellant. The military judge convicted Lieutenant (LT) Hawes for fraternizing with several airmen while off-duty. He allegedly allowed the enlisted men to address him by his first name on several occasions.⁸⁷ Lieutenant Hawes was a close friend with one of

79. 50 M.J. 506 (A.F. Ct. Crim. App. 1998).

80. 46 M.J. 26 (1997).

81. *Sanchez*, 50 M.J. at 508.

82. *Id.* at 512.

83. *Id.* at 508.

84. *Id.*

85. *Id.* at 513. Further, the court affirmed the sentence.

86. 51 M.J. 258 (1999).

87. *Id.* at 259.

the men, and their friendship extended as far back as kindergarten.⁸⁸ On appeal, the Air Force court set aside the fraternization conviction, being “not convinced . . . that appellant’s conduct amounted to fraternization.”⁸⁹ The court was convinced, however, as to LT Hawes’s conviction for smoking marijuana with his childhood friend, and affirmed the sentence.⁹⁰

The CAAF affirmed, finding no abuse of discretion in the lower court’s sentence reassessment. In his dissent, Judge Sullivan disagreed, believing that it was “highly unlikely” that LT Hawes would have received the same sentence at a rehearing that focused only on the drug use offense.⁹¹ In Judge Sullivan’s view, because LT Hawes contested the fraternization charge and pled guilty to drug use, the ultimate findings that include only the pled offense “clearly puts him in a more favorable posture before the sentencing court.”⁹² Additionally, that both offenses carried the same maximum punishment provides more support for the contention that it is highly unlikely LT Hawes got “the exact same sentence if he had been tried for one felony crime rather than two.”⁹³ In Judge Sullivan’s view, the offense of off-duty fraternization cannot be regarded as so trivial that dismissal of such charge renders no benefit to the accused.

What Do You Mean, “I order you to stay away from your girlfriend?”

In *United States v. Mann*,⁹⁴ the Air Force court examined an unprofessional relationship, charged as fraternization, between

a male major and a female master sergeant that included “dining alone with her, traveling alone with her, spending off-duty time with her, exercising together, and frequently speaking on the phone.”⁹⁵ The pair’s military duties required them to work occasionally in close proximity and Mann’s appeal argued, inter alia, that because the members excepted out the allegations involving sex and back rubs that the remaining evidence was insufficient to show he had treated the master sergeant on terms of military equality.⁹⁶ Mindful that “a sexual relationship is not a prerequisite for conviction of fraternization,”⁹⁷ the Air Force court disagreed and held the members’ finding to be legally and factually sufficient.⁹⁸

At trial and on appeal, Mann also challenged the legality of an order, given to him by his mission support commander not to contact the master sergeant, as an unlawful one that amounted to unlawful command influence and that restricted his constitutional right to confront witnesses.⁹⁹ The commander issued this order, which did not restrict Mann’s attorney from contacting the master sergeant, because she “felt it was appropriate.”¹⁰⁰ The military judge ruled that the order furthered military needs and did not otherwise prejudice Mann and the Air Force court agreed.¹⁰¹ The order, designed to stop any additional impropriety between the two service members, “served a legitimate military purpose, thus maintaining good order and discipline within the military community.”¹⁰²

88. *Id.*

89. *Id.*

90. *Id.* “The fraternization offense was relatively trivial in comparison to appellant’s drug use with an airman.” *Id.* (citing *United States v. Dawes*, No. 98-0199, unpub. op. at 4 (A.F. Ct. Crim. App. Oct. 24, 1997) available in 1997 CCA LEXIS 522, at *8).

91. 51 M.J. at 261 (citing *United States v. Davis*, 48 M.J. 494, 496 (1998) (Sullivan, J., dissenting); *United States v. Sales*, 22 M.J. 305 (CMA 1986); *United States v. Jones*, 39 M.J. 315, 317 (CMA 1994) (“[R]eassessment appropriate where ‘the accused’s sentence would have been at least of a certain magnitude.’”).

92. *Id.*

93. *Id.*

94. 50 M.J. 689 (A.F. Ct. Crim. App. 1999).

95. *Id.* at 692. The members found MAJ Mann guilty of the charge by excepting out language alleging that he had engaged in sexual intercourse with and had received back rubs from the master sergeant. Both Mann and the master sergeant were married to other Air Force personnel during this time.

96. *Id.* at 696. Mann’s argument contended factual and legal insufficiency “because there is ‘no clear line between what conduct is or is not considered professional and appropriate with respect to officers and enlisted personnel who are required to work as a team or in a mentoring relationship.’” *Id.* at 692.

97. *Id.* at 696 (citing *United States v. McCreight*, 43 M.J. 483 (1996); *United States v. Nunes*, 39 M.J. 889 (A.F.C.M.R. 1994)).

98. *Id.* The information before the members was sufficient to show that “appellant’s conduct with MSGT SDP negatively affected good order and discipline and compromised the appellant’s authority as an officer.” *Id.*

99. *Id.* at 698.

100. *Id.* The order compelled Mann to “cease and refrain from any and all contact of any nature” with the MSG, included language rendering it a punitive order, and also mentioned that Mann’s counsel could have unrestricted access to the witness. *Id.* at 700.

101. *Id.* at 701.

"But I Don't Wanna Redeploy, I'm Having too Much Fun!"

In *United States v. Rogers*,¹⁰³ the Air Force court examined a specification, charged under Article 133, UCMJ, that alleged an unprofessional relationship "of inappropriate familiarity" between a squadron commander and a subordinate officer.¹⁰⁴ The appellant contended that such specification failed to state an offense inasmuch as it failed to allege a violation of a custom of the service and failed to specify those acts alleged to have amounted to "inappropriate familiarity."¹⁰⁵ The court disagreed and found that proof of a custom or of a regulation prohibiting the type of conduct committed by the appellant is not required by Article 133 and that, in the final analysis, "[I]t is for the members to determine, under all the circumstances of the case, whether the accused's conduct fell below the acceptable level" of conduct expected of officers.¹⁰⁶

While deployed to Italy with his squadron, LTC Rogers, the squadron commander, developed an unprofessional relationship with a female lieutenant also in his squadron. Over a period of nearly a month, the pair spent, what several other officers in the squadron believed, "an inordinate amount of time together."¹⁰⁷ The appellant inappropriately pursued the very intoxicated lieutenant at a squadron Thanksgiving party, changed his weekend travel plans so that he could be "in the mountains with a beautiful woman,"¹⁰⁸ traveled back and forth between the squadron and his hotel with the subordinate officer, worked out at the gym with her, and ate with her at local restaurants.¹⁰⁹ At the end of the deployment, the appellant informed another officer that Mrs. Rogers had planned a "romantic rendezvous" in Hawaii with her husband but despite missing his family appellant did not want to go because "he was having too much fun."¹¹⁰

At the time of appellant's misconduct, the Air Force defined "unprofessional relationships" pursuant to its former senior-subordinate relationships policy, one that was not punitive but that alerted Air Force personnel to the possibility of punitive sanctions for noncompliance.¹¹¹ Air Force authorities did not, therefore, have the option of charging an Article 92 offense and instead looked to Article 133 for resolution of appellant's case. The Air Force court noted that the specification did not fail to state an offense, that the appellant had adequate notice of the offense against which he had to defend, and that the government neither was required to prove a violation of a custom of the Air Force nor to prove the existence of a regulation prohibiting the misconduct. The court concluded that appellant's role in the relationship at issue in fact "fell below the standards established for Air Force officers."¹¹²

Conclusion

Improper relationships among the ranks may now be analyzed under policies that uniformly, if by varying degrees, arrive at conclusions that are consistent among the services. There are minor but important distinctions among the respective policies that judge advocates, especially those practicing in joint environments, must understand and apply. At least with respect to officer personnel in all services, the policies now provide a potential sanction under Article 92, UCMJ, for noncompliance. Yet there also remain several other viable alternatives that provide additional options when the situation does not fit neatly in a given policy analysis or, in the case involving personnel from different services, requires a cross-policy comparison. With increasing jointness, practitioners of military law are well advised to know the ground rules of all the various service policies that reach relations among the ranks.

102. *Id.*

103. 50 M.J. 805 (A.F. Ct. Crim. App. 1999).

104. *Id.* at 806.

105. *Id.*

106. *Id.* at 812.

107. *Id.* at 811. This is the Air Force court's recitation of those facts it believed rose to the level of legal sufficiency required to affirm the findings.

108. *Id.* at 812.

109. *Id.* at 811.

110. *Id.* at 812.

111. *Id.* at 808. That policy relied on Air Force Instruction 36-2909, *Fraternization and Professional Relationships* (20 Feb. 95), wherein unprofessional relationships were defined as "[p]ersonal relationships [regardless of rank or status] which result in inappropriate familiarity or create the appearance of favoritism, preferential treatment, or impropriety." *Rogers*, 50 M.J. at 809.

112. *Rogers*, 50 M.J. at 812.